TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1922

No. [redacted] 121.

THE UNITED STATES, APPELLANT,

vs.

MASON & HANGER COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

FILED JULY 28, 1922.

(25205)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 410.

THE UNITED STATES, APPELLANT,

vs.

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1 Court of Claims.

MASON & HANGER COMPANY
vs.
THE UNITED STATES. } No. 34208.

I. *Petition and amended petition.*

On October 1, 1919, the plaintiff filed its original petition and Exhibit "A" to same.

On February 16, 1920, by leave of court, the plaintiff filed its amended petition, which is as follows:

II. *Amended petition.*

[Filed February 16, 1920.]

To the honorable the Court of Claims:

The claimant, Mason & Hanger Company, respectfully represents:

I. That it is a corporation organized under the laws of the State of Kentucky with its principal office and place of business at Richmond, Madison County, of said State.

II. On the 20th day of June, 1917, a contract was signed by it represented by its president, H. B. Hanger, and by Major W. A. Dempsey, U. S. A., on behalf of the United States, which contract became effective on its date, whereby the claimant agreed to furnish the necessary labor, material, tools, machinery, equipment, facilities, and supplies and do all things necessary for the construction and completion of certain buildings and other utilities at Camp Zachary Taylor near Louisville, Kentucky, on the basis of cost plus a fixed profit of fee for the work done. A copy of said contract is attached to the original as Exhibit "A" and is made a part hereof.

III. Said contract provided in Article II, Section (h), that the contractor, among other items of cost, should be reimbursed for such of its expenditures made on account of the premiums on such bonds, fire, liability, and other insurance as the contracting officer
2 might approve or require. On entering upon the work claimant through its representative procured the usual and necessary public liability, automobile liability, and burglary and hold-up insurance, and in due course paid the necessary premiums on such insurance as follows:

(a) Public liability insurance	$7,111.14
(b) Automobile liability insurance on trucks hired by the contractor but operated by owners	715.56
(c) Automobile liability insurance on machines operated by the contractor	835.27
(d) Burglary and hold-up insurance on pay-roll funds	452.55

IV. These policies were taken out by claimant without antecedent request of the contracting officer. Colonel (later Brigadier-General)

I. W. Littell, who was then Chief of Cantonment Construction in the War Department, was on July 16, 1917, substituted by the Secretary of War as contracting officer in place of Major W. A. Dempsey, the original contracting officer, said Colonel Littell being then the immediate superior of said Major Dempsey. Said Colonel Littell, under date of December 22, 1917, addressed a letter to the Constructing Quartermaster at Camp Zachary Taylor approving the insurance theretofore procured and directing that the contractor be reimbursed the expenditures made on account of the cost thereof amounting to $9,114.52, his said approval and directions being in the following language:

"2. As contracting officer, I hereby approve the action of Mason & Hanger Company, the contractor, in taking out these policies of insurance, and I hereby authorize you as quartermaster to reimburse Mason & Hanger Company the sum of $9,114.52, the amount of premium paid upon these policies of insurance."

3 This action was taken in accordance with a policy established by the Chief of the Construction Division of the War Department, under the authority of the Secretary of War, and was approved by the Chief of the Construction Division.

V. The constructing quartermaster having some doubt, notwithstanding such direction and approval, as to the propriety of paying the charges in question, submitted the question to the Comptroller of the Treasury, which officer disapproved the payment, and the constructing quartermaster refused reimbursement accordingly. The contractor thereupon filed claim with the Auditor for the War Department for payment and his claim was disallowed. On appeal to the Comptroller of the Treasury, the auditor's action was on June 25, 1919, affirmed.

VI. Claimant now represents that the several policies of insurance as above listed were obtained with the approval of the contracting officer and in pursuance of the contract undertaking, and that it had made net expenditures therefor as an incident to the performance of the contract work, amounting to $9,114.52, and it now claims the said sum of $9,114.52.

VII. Said contract of June 20, 1917, further provided among other things in Article II as follows:

"Cost of the Work.—The contractor shall be reimbursed in the manner hereinafter described for such of its actual net expenditures in the performance of said work as may be approved or ratified by the contracting officer and as are included in the following items.

* * * * * * *

"(h) Such bonds, fire, public liability, employer's liabil'y, workmen's compensation, and other insurance as the contracting officer may approve or require."

* * * * * * *

4 Said contract further provided in Article IX as follows:

"Bond.—The contractor shall prior to commencing the said work furnish a bond, with sureties satisfactory to the contract-

ing officer, in the sum of two hundred and fifty thousand dollars ($250,000), conditioned upon its full and faithful performance of all the terms, conditions, and provisions of this contract, and upon its prompt payment of all bills for labor, material or other service furnished to the contractor."

VIII. On entering on the work, claimant through its representatives procured the surety bond required by Article IX above quoted and such bond was duly approved by the contracting officer or his representative. Its subcontractor, Scheirich and Meyer, also at the instance and under the requirement of the contracting officer, furnished a bond for forty-five thousand dollars ($45,000), which was likewise approved.

IX. The contractor thereafter paid the actual necessary cost of the bond given by it and the bond given as aforesaid by its subcontractor, Scheirich and Meyer, amounting in the first case to two thousand five hundred dollars ($2,500) and in the second to four hundred and fifty dollars ($450), or two thousand nine hundred and fifty dollars ($2,950) in all, and presented vouchers covering such payments to the contracting officer for his approval and payment, and the said sums of two thousand five hundred dollars ($2,500) and four hundred and fifty dollars ($450), respectively, were upon the approval of the contracting officer duly reimbursed to the contractor. Such payment was made under the following provision of the contract, Article IV:

"Payments.—On or about the seventh day of each month the contracting officer and the contractor shall prepare a statement showing as completely as possible: (1) The cost of the work up to and including the last day of the previous month, (2) the cost of the materials furnished by the contracting officer up to and including such last day, and (3) an amount equal to two and one-half per cent (2½%), except as herein otherwise provided, of the sum of (1) and (2) on account of the contractor's fee; and the contractor at such time shall deliver to the contracting officer original signed payrolls for labor, original invoices for materials purchased, and all other original papers not theretofore delivered supporting expenditures claimed by the contractor to be included in the cost of the work. If there be any item or items entering into such statement upon which the contractor and the contracting officer can not agree, the decision of the contracting officer as to such disputed item or items shall govern. The contracting officer shall then pay to the contractor on or about the ninth day of each month the cost of the work mentioned in (1) and the fee mentioned in (3) of such statement, less all previous payments. When the statement above mentioned includes any work of reconstructing and replacing work destroyed or damaged, the payment on account of the fee in (3) for such reconstruction and replacement work shall be computed at such rate, not exceeding two and one-half per cent (2½%), as the contracting officer may determine. The statement so made and all payments made thereon shall be final and binding upon both parties hereto, except as provided in Article XIV hereof."

X. The Comptroller of the Treasury later ruled that the form of contract used here and in all other cases of like character did not form a legal basis for the reimbursement to the contractor of cost of premiums on surety bonds. In accordance with this decision on final settlement of moneys due under this contract the sum of two thousand nine hundred and fifty dollars ($2,950) representing the sums previously reimbursed as covering the costs incurred on account of surety bonds was deducted and withheld from moneys due the
6 contractor as reimbursement to the United States of the sums previously paid the claimant, covering cost of premiums on surety bonds as aforesaid. Such deduction was made in the accounts of Ira J. Hooks, Captain, Quartermaster Corps, U. S. Army, for the month of January, 1920, voucher No. 44.

Claimant refused to agree to said deduction and protested against same by placing on the voucher aforesaid the following statement:

"It is to be understood that in accepting payment evidenced by the attached voucher under our contract of June 20, 1917, for the construction of the Louisville cantonment, afterwards known as Camp Zachary Taylor, we do so without in any wise waiving our legal rights to full reimbursement under the terms of our contract of all sums paid by us as premiums on bonds. We expressly reserve our rights to reimbursement of all sums paid by us on such account."

XI. Claimant now represents that the bonds given as above set forth were obtained with the approval of the contracting officer and by virtue of the contract provisions requiring the same to be given; that the cost of such bonds was a part of the cost of the work of constructing Camp Zachary Taylor; that said contractor made a net expenditure of two thousand nine hundred and fifty dollars ($2,950) on account thereof and that it has not been reimbursed the amount of such expenditure as provided for in the contract aforesaid.

XII. No other action has been had on said claim in Congress or by any of the departments; no person other than the claimant is the owner thereof or interested therein; no assignment or transfer of this claim, or of any part thereof or interest therein, has been made; the claimant is justly entitled to the amount herein claimed from the United States after allowing all just credits and offsets; the
7 claimant has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government. The claimant is a citizen of the United States. And the claimant claims twelve thousand sixty-four dollars and fifty-two cents ($12,065.52).

KING & KING,
Attorneys for Claimant.

DISTRICT OF COLUMBIA, *ss:*

William B. King, being duly sworn, deposes and says: I am one of the attorneys of the claimant corporation in this case. I have read

the above petition, and the matters therein stated are true, to the best of my knowledge, information, and belief.

WILLIAM B. KING.

Subscribed and sworn to before me this 2d day of February, 1920.
[SEAL.] MAY LOU H. BYINGTON,
Notary Public.

8 *Exhibit "A" to claimant's petition.*

Contract for emergency work.

Construction of cantonment at Louisville, Ky.

Contract made and concluded this twentieth day of June, 1917, by and between Mason & Hanger Co., of Richmond, Madison County, Kentucky, a corporation organized under the laws of the State of West Virginia, represented by H. B. Hanger, its president, party of the first part (hereinafter called contractor), and the United States of America by Major W. A. Dempsey, Q. M. U. S. R. (hereinafter called contracting officer), acting by authority of the Secretary of War, party of the second part.

Whereas the Congress having declared by joint resolution approved April 6, 1917, that war exists between the United States of America and Germany, a national emergency exists and the United States urgently requires the immediate performance of the work hereinafter described, and it is necessary that said work shall be completed within the shortest posible time; and

Whereas it is advisable under the disturbed conditions which exist in the contracting industry throughout the country for the United States to depart from the usual procedure in the matter of letting contracts, and adopt means that will insure the most expeditious results; and

Whereas the contractor has had experience in the execution of similar work, has an organization suitable for the performance
9 of such work, and is ready to undertake the same upon the terms and conditions herein provided:

Now, therefore, this contract witnesseth, that in consideration of the premises and of the payments to be made as hereinafter provided, the contractor hereby covenants and agrees to and with the contracting officer as follows:

Article I.

Extent of the work.—The contractor shall, in the shortest possible time, furnish the labor, material, tools, machinery, equipment, facilities, and supplies, and do all things necessary for the construction and completion of the following work:

At Louisville, Kentucky.

Buildings and other utilities except roads, stoves, bunks, mattresses, ranges, and refrigerators for an Infantry division including the following additional units, viz:

One additional brigade headquarters.

Two regiments of Infantry.

in accordance with the drawings and specifications to be furnished by the contracting officer, and subject in every detail to his supervision, direction, and instruction.

The contracting officer may, from time to time, by written instructions or drawings issued to the contractor make changes in said drawings and specifications, issue additional instructions, require additional work, or direct the omission of work previously ordered, and the provisions of this contract shall apply to all such changes, modifications, and additions with the same effect as if they were embodied in the original drawings and specifications. The contractor shall comply with all such written instructions or drawings.

The title to all work completed or in course of construction shall be in the United States; and upon delivery at the site of the work, and upon inspection and acceptance in writing by the contracting officer, all machinery, equipment, hand tools, supplies, and materials, for which the contractor shall be entitled to be reimbursed under paragraph (a) of Article II hereof, shall become the property of the United States. These provisions as to title shall not operate to relieve the contractor from any duties imposed hereby or by the contracting officer.

Article II.

Cost of the work.—The contractor shall be reimbursed in the manner hereinafter described for such of its actual net expenditures in the performance of said work as may be approved or ratified by the contracting officer and as are included in the following items:

(a) All labor, material, machinery, hand tools not owned by the workmen, supplies and equipment, necessary for either temporary or permanent use for the benefit of said work; but this shall not be construed to cover machinery or equipment mentioned in section (c) of this article. The contractor shall make no departure from the standard rate of wages being paid in the locality where said work is being done without the prior consent and approval of the contracting officer.

(b) All subcontracts made in accordance with the provisions of this agreement.

(c) Rental actually paid by the contractor, at rates not to exceed those mentioned in the schedule of rental rates hereto attached, for construction plant in sound and workable condition, such as pumps, derricks, concrete mixers, boilers, clam-shell or other buckets, electric motors, electric drills, electric hammers, electric hoists, steam shovels, locomotive cranes, power saws, engineers' levels and transits, and

such other equipment as may be necessary for the proper and economical prosecution of the work.

Rental to the contractor for such construction plant or parts thereof as it may own and furnish, at the rates mentioned in the schedule of rental rates hereto attached, except as hereinafter set forth. When such construction plant or any part thereof shall arrive at the
11 site of the work, the contractor shall file with the contracting officer a schedule setting forth the fair valuation at that time of each part of such construction plant. Such valuation shall be deemed final, unless the contracting officer shall, within five days after the machinery has been set up and is working, modify or change such valuation, in which event the valuation so made by the contracting officer shall be deemed final. When and if the total rental paid to the contractor for any such part shall equal the valuation thereof no further rental therefor shall be paid to the contractor and title thereto shall vest in the United States. At the completion of the work, the constructing officer may at his option purchase for the United States any part of such construction plant then owned by the contractor by paying to the contractor the difference between the valuation of such part or parts and the total rentals theretofore paid therefor.

Rates of rental as substitutes for such scheduled rental rates may be agreed upon in writing between the contractor and the contracting officer, such rates to be in conformity with rates of rental charged in the particular territory in which the work covered by this contract is to be performed. If the contracting officer shall furnish or supply any such equipment, the contractor shall not be allowed any rental therefor and shall receive no fee for the use of such equipment.

(d) Loading and unloading such construction plant, the transportation thereof to and from the place or places where it is to be used in connection with said work subject to the provisions hereinafter set forth, the installation and dismantling thereof, and ordinary repairs and replacements during its use on the said work.

(e) Transportation and expenses to and from the work of the necessary field forces for the economical and successful prosecution of the work, procuring labor and expediting the production and transportation of material and equipment.

(f) Salaries of resident engineers, superintendents, timekeepers, foremen, and other employees at the field offices of the con-
12 tractor in connection with said work. In case the full time of any field employee of the contractor is not applied to said work but is divided between said work and other work, his salary shall be included in this item only in proportion to the actual time applied to this work.

(g) Buildings and equipment required for necessary field offices, commissary, and hospital, and the cost of maintaining and operating said offices, commissary, and hospital, including such minor expenses as telegrams, telephone service, expressage, postage, etc.

(h) Such bonds, fire, liability, and other insurance as the contracting officer may approve or require; and such losses and expenses, not compensated by insurance or otherwise, as are found and certified by the contracting officer to have been actually sustained (including settlements made with the written consent and approval of the contracting officer) by the contractor in connection with said work, and to have clearly resulted from causes other than the fault or neglect of the contractor. Such losses and expenses shall not be included in the cost of the work for the purpose of determining the contractor's fee. The cost of reconstructing and replacing any of the work destroyed or damaged shall be included in the cost of the work for the purpose of reimbursement to the contractor, but not for the purpose of determining the contractor's fee, except as hereinafter provided.

(i) Permit fees, deposits, royalties, and other similar items of expense incidental to the execution of this contract, and necessarily incurred. Expenditures under this item must be approved in advance by the contracting officer.

(j) Such proportion of the transportation, traveling, and hotel expenses of officers, engineers, and other employees of the contractor as is actually incurred in connection with this work.

(k) Such other items as should in the opinion of the contracting officer be included in the cost of the work. When such an item is allowed by the contracting officer, it shall be specifically certified as being allowed under this paragraph.

13 The United States reserves the right to pay directly to common carriers any or all freight charges on material of all kinds and machinery, furnished under this contract and certified by the contracting officer as being for installation or for consumption in the course of the work hereunder; the contractor shall be reimbursed for such freight charges of this character as it shall pay and as shall be specifically certified by the contracting officer; but the contractor shall have no fee based on such expenditures. Freight charges paid by the contractor for transportation of construction equipment, construction plant, tools, and supplies of every character shall be treated as part of the cost of the work upon which the contractor's fee shall be based; provided that charges for transportation of such construction equipment, construction plant, and tools over distances in excess of five hundred miles shall require the special approval of the contracting officer.

No salaries of the contractor's executive officers, no part of the expense incurred in conducting the contractor's main office, or regularly established branch office, and no overhead expenses of any kind, except as specifically listed above, shall be included in the cost of the work; nor shall any interest on capital employed or on borrowed money be included in the cost of the work.

The contractor shall take advantage to the extent of its ability of all discounts available, and when unable to take such advantage shall promptly notify the contracting officer of its inability and its reasons therefor.

All revenue from the operations of the commissary, hospital or other facilities or from rebates, refunds, etc., shall be accounted for by the contractor and applied in reduction of the cost of the work.

Article III.

Determination of fee.—As full compensation for the services of the contractor, including profit and all general overhead ex-
14 pense, except as herein specifically provided, the contracting officer shall pay to the contractor in the manner hereinafter prescribed a fee to be determined at the time of completion of the work from the following schedule, except as hereinafter otherwise provided:

If the cost of the work is under $100,000.00 a fee of ten per cent (10%) of such cost.

If the cost of the work is over $100,000.00 and under $125,000.00 a fee of $10,000.00.

If the cost of the work is over $125,000.00 and under $250,000.00 a fee of eight per cent (8%) of such cost.

If the cost of the work is over $250,000.00 and under $266,666.67 a fee of $20,000.00.

If the cost of the work is over $266,666.67 and under $500,000.00 a fee of seven and one-half per cent (7½%) of such cost.

If the cost of the work is over $500,000.00 and under $535,714.29 a fee of $37,500.00.

If the cost of the work is over $535,714.29 and under $3,000,000.00 a fee of seven per cent (7%) of such cost.

If the cost of the work is over $3,000,000.00 and under $3,500,000.00 a fee of $210,000.00.

If the cost of the work is over $3,500,000.00 a fee of six per cent (6%) of such cost.

Provided, however, that the fee upon such part of the cost of the work as is represented by payments to subcontractors, under subdivision (b) above, shall in each of the above contingencies be five per cent (5%) and no more of the amount of such part of the cost.

The cost of materials purchased or furnished by the contracting officer for said work, exclusive of all freight charges thereon, shall be included in the cost of the work for the purpose of reckoning such fee to the contractor, but for no other purpose.

The fee for reconstructing and replacing any of the work destroyed or damaged shall be such percentage of the cost thereof—not exceeding seven per cent (7%)—as the contracting officer may determine.

The total fee to the contractor hereunder shall in no event exceed the sum of $250,000.00, anything in this agreement to the contrary notwithstanding.

15 Article IV.

Payments.—On or about the seventh day of each month the contracting officer and the contractor shall prepare a statement showing

as completely as possible: (1) The cost of the work up to and including the last day of the previous month; (2) the cost of the materials furnished by the contracting officer up to and including such last day, and (3) an amount equal to three and one-half per cent (3½%), except as herein otherwise provided, of the sum of (1) and (2) on account of the contractor's fee; and the contractor at such time shall deliver to the contracting officer original signed pay rolls for labor, original invoices for materials purchased and all other original papers not theretofore delivered supporting expenditures claimed by the contractor to be included in the cost of the work. If there be any item or items entering into such statement upon which the contractor and the contracting officer can not agree, the decision of the contracting officer as to such disputed item or items shall govern. The contracting officer shall then pay to the contractor on or about the ninth day of each month the cost of the work mentioned in (1) and the fee mentioned in (3) of such statement, less all previous payments. When the statement above mentioned includes any work of reconstructing and replacing work destroyed or damaged, the payment on account of the fee in (3) for such reconstruction and replacement work shall be computed at such rate not exceeding three and one-half per cent (3½%), as the contracting officer may determine. The statement so made and all payments made thereon shall be final and binding upon both parties hereto, except as provided in Article XIV hereof. The contracting officer may also make payments at more frequent intervals for the purpose of enabling the contractor to take advantage of discounts at intervals between the dates above mentioned or for other lawful purposes. Upon final completion of said work the contracting officer shall pay to the contractor the unpaid balance of the cost of the work and of the fee as determined under Articles II and III hereof.

16 Article V.

Inspection and audit.—The contracting officer shall at all times be afforded proper facilities for inspection of the work and shall at all times have access to the premises, to the work, and material, and to all books, records, correspondence, instructions, plans, drawings, receipts, vouchers, and memoranda of every description of the contractor pertaining to said work; and the contractor shall preserve for a period of two years after its completion or cessation of work under this contract, all the books, records, and other papers just mentioned. Any duly authorized representative of the contractor shall be accorded the privilege of examining the books, records, and papers of the contracting officer relating to said work for the purpose of checking up and verifying the cost of said work. The system of accounting to be employed by the contractor shall be such as is satisfactory to the contracting officer.

If at any time the contracting officer shall find that bills for labor or material or other bills legitimately incurred by the contractor here-

under, are not promptly paid by the contractor, the contracting officer may, in his discretion, refuse to make further payments to the contractor until all such obligations past due shall have been paid. Should the contractor neglect or refuse to pay such bills within five days after notice from the contracting officer so to do, then the contracting officer shall have the right to pay such bills directly, in which event such direct payments shall not be included in the cost of the work.

Article VI.

Special requirements.—The contractor hereby agrees that it will:

(a) Begin the work herein specified at the earliest time practicable, and diligently proceed so that such work may be completed at the earliest possible date.

(b) Promptly pay for all labor, material, or other service rendered.

(c) Procure and thereafter maintain such insurance in such
17 forms and in such amounts, and for such periods of time as the contracting officer may approve or require.

(d) Procure all necessary permits and licenses, and obey and abide by all laws, regulations, ordinances, and other rules applying to such work, of the United States of America, of the State or Territory wherein such work is done, of any subdivision thereof, or of any duly constituted public authority.

(e) Unless this provision is waived by the contracting officer, insert in every contract made by it for the furnishing to it of services, materials, supplies, machinery, and equipment, or the use thereof, for the purposes of the work hereunder, a provision that such contract is assignable to the United States; will make all such contracts in its own name, and will not bind or purport to bind the United States or the contracting officer thereunder.

(f) In every subcontract made in accordance with the provisions hereof, require the subcontractor to agree to comply fully with all the undertakings and obligations of the contractor herein, excepting such as do not apply to such subcontractor's work.

(g) At all times keep at the site of the work a duly appointed representative who shall receive and execute on the part of the contractor such notices, directions, and instructions as the contracting officer may desire to give.

(h) At all times use its best efforts in all its acts hereunder to protect and subserve the interest of the contracting officer and the United States.

Article VII.

Right to terminate contract.—Should the contractor at any time refuse, neglect, or fail in any respect to prosecute the work with promptness and diligence or default in the performance of any of the agreements herein contained, the contracting officer may, at his option, after five days' written notice to the contractor, terminate this contract, and may enter upon the premises and take possession,

18 for the purpose of completing said work, of all materials, tools, equipment, and appliances, and all options, privileges, and rights, and may complete, or employ any other person or persons to complete said work. In case of such termination of the contract, the contracting officer shall pay to the contractor such amounts of money on account of the unpaid balance of the cost of the work and of the fee as will result in fully reimbursing the contractor for the cost of the work up to the time of such termination, plus a fee computed thereon at the rate or rates for monthly payments set forth in Article IV hereof; and the contracting officer shall also pay to the contractor compensation, either by purchase or rental, at the election of the contracting officer, for any equipment retained; such compensation, in the event of rental, to be in accordance with paragraph (c) of Article II, and in the event of purchase to be based upon the valuation determined by the contracting officer as of the time of his taking such possession. The contractor hereby agrees that such payments when made shall constitute full settlement of all claims of the contractor against the contracting officer and the United States or either of them for money claimed to be due to the contractor for any reason whatsoever. In case of such termination of the contract the contracting officer shall further assume and become liable for all such obligations, commitments, and unliquidated claims as the contractor may have theretofore in good faith undertaken or incurred in connection with said work, and the contractor shall, as a condition of receiving the payments mentioned in this article, execute and deliver all such papers, and take all such steps as the contracting officer may require for the purpose of fully vesting in him the rights and benefits of the contractor under such obligations or commitments. When the contracting officer shall have performed the duties incumbent upon him under the provisions of this article, the contracting officer shall thereafter be entirely released and discharged of and from any and all demands, actions, or claims of any kind on the part of the contractor hereunder or on account hereof.

19 Article VIII.

Abandonment of work by contracting officer.—If conditions should arise which in the opinion of the contracting officer make it advisable or necessary to cease work under this contract, the contracting officer may abandon the work and terminate this contract. In such case the contracting officer shall assume and become liable for all such obligations, commitments, and unliquidated claims as the contractor may have theretofore, in good faith, undertaken or incurred in connection with said work; and the contractor shall, as a condition of receiving the payments mentioned in this article, execute and deliver all such papers, and take all such steps as the contracting officer may require for the purpose of fully vesting in him the rights and benefits of the contractor under such obligations or commitments. The contracting officer shall pay to the contractor such an amount of money on account

of the unpaid balance of the cost of the work and of the fee as will result in the contractor receiving full reimbursement for the cost of the work up to the time of such abandonment, plus a fee to be computed in the following manner: To the cost of the work up to the time of such abandonment shall be added the amount of the contractual obligations or commitments assumed by the contracting officer, and such total shall be treated as the cost of the work, upon which the fee shall be computed in accordance with the provisions of Article III hereof. When the contracting officer shall have performed the duties incumbent upon him under the provisions of this article the contracting officer and the United States shall thereafter be entirely released and discharged of and from any and all demands, actions or claims of any kind on the part of the contractor hereunder or on account hereof.

Article IX.

Bond.—The contractor shall prior to commencing the said work furnish a bond, with sureties satisfactory to the contracting officer, in the sum of two hundred fifty thousand ($250,000.00) dollars, conditioned upon its full and faithful performance of all the terms, conditions, and provisions of this contract, and upon its prompt payment of all bills for labor, material, or other service furnished to the contractor.

Article X.

Convict labor.—No person or persons shall be employed in the performance of this contract who are undergoing sentence of imprisonment at hard labor imposed by the courts of any of the several States, Territories, or municipalities having criminal jurisdiction.

Article XI.

Hours and conditions of labor.—No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the contractor, or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight (8) hours in any one calendar day upon such work, such prohibition being in accordance with the act approved June 19, 1912, limiting the hours of daily service of mechanics and laborers on work under contracts to which the United States is a party. For each violation of the requirements of this article a penalty of five dollars ($5.00) shall be imposed upon the contractor for each laborer or mechanic for every calendar day in which said employee is required or permitted to labor more than eight (8) hours upon said work, and all penalties thus imposed shall be withheld for the use and benefit of the United States; provided, that this paragraph shall not be enforced nor shall any penalty be exacted in case such violation shall occur while there is in effect any valid executive order suspending the

provisions of said act approved June 19, 1912, or waiving the provisions and stipulations thereof with respect to either this contract or any class of contracts in which this contract shall be included, or when the violation shall be due to any extraordinary events or conditions of manufacture, or to any emergency caused by fire,
21 famine, or flood, by danger to life or property, or by other extraordinary events or conditions on account of which, by subsequent executive order, such past violations shall have been excused.

In the event of any dispute with reference to wages, hours, or other conditions appertaining to said work, between the contractor or any subcontractor and labor employed by him on said work, the contractor or subcontractor shall immediately notify the contracting officer of the existence of such dispute and the reasons therefor. The contracting officer may, at his option, instruct the contractor or subcontractor involved in such dispute as to the method or steps which the contractor or subcontractor should follow with reference thereto, and the contractor or subcontractor shall thereupon comply with such instructions.

Article XII.

Right to transfer or sublet.—Neither this contract nor any interest therein shall be assigned or transferred. The contractor shall not enter into any subcontract for any part of the work herein specified without the consent and approval in writing of the contracting officer. In case of such assignment, transfer, or subletting without the consent and approval, in writing, of the contracting officer, the contracting officer may refuse to carry out this contract either with the transferer or transferee, but all rights of action for any breach of this contract by the contractor are reserved to the United States.

Article XIII.

No participation in profits by Government officials.—No member of, or Delegate to, Congress, or Resident Commissioner, nor any other person belonging to or employed in the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom, but this article shall not apply to this contract so far as it may be within the operation
22 or exception of section 116 of the act of Congress approved March 4, 1909 (35 Stats. 1109).

Article XIV.

Settlement of disputes.—This contract shall be interpreted as a whole and the intent of the whole instrument, rather than the interpretation of any special clause, shall govern. If any doubts or disputes shall arise as to the meaning or interpretation of anything in this contract, or if the contractor shall consider himself prejudiced by any decision of the contracting officer made under the provisions

of Article IV hereof, the matter shall be referred to the officer in charge of cantonment construction for determination. If, however, the contractor shall feel aggrieved by the decision of the officer in charge of cantonment construction, he shall have the right to submit the same to the Secretary of War, whose decision shall be final and binding upon both parties hereto.

Article XV.

This contract shall bind and inure to the contractor and its successors.

It is understood and agreed that wherever the words "contracting officer" are used herein, the same shall be construed to include his successor in office, any other person to whom the duties of the contracting officer may be assigned by the Secretary of War and any duly appointed representative of the contracting officer.

Witness the hands of the parties hereto the day and year first above written, all in triplicate.

MASON & HANGER CO.,
[SEAL] By H. B. HANGER,
President.

UNITED STATES OF AMERICA,
By W. A. DEMPSEY,
Contracting Officer.

23 SCHEDULE OF RENTAL RATES.

(The rates mentioned are per day.)

Automobiles	$5.00
Adding and listing machines	.20
Buckets, tipple and bottom dump	.25
Boring machine, pneumatic	.50
Boring machine, electric	.50
Buckets, orangepeel, 1 yard	3.50
Buckets, orangepeel, less than 1 yard	2.00
Buckets, clamshell	2.00
Boiler and 3 drum engine	3.50
Boiler and 2 drum engine	3.00
Boiler and 1 drum engine	2.50
Boiler only, 30 h. p. and smaller	1.50
Boiler only, larger than 30 h. p	2.00
Block machine, concrete	1.50
Cars, skip, 1½ yards	.25
Cars, skip, 3 yards	.50
Cars, steel, 1 yard and smaller	.15
Cars, 4 yards, wooden	.25
Cars, 6 yards, wooden	.75

	Cars, 12 yards, wooden	$2.00
	Cars, 1 yard, hopper, radial gate	.25
	Crushers only	2.00
	Crushers with elevator and screen	3.00
	Conveyor, gravity, per 100 feet	1.00
	Compressor, 10 x 10 with steam engine	2.50
	Compressor, 8 x 8, belt driven	1.00
	Compressor with gasoline engine on wheels	5.00
	Compressor, Westinghouse, 9½ inch	1.00
	Cableways, without engine	4.00
	Drill, auto traction	5.00
	Dump wagons	.25
	Diving outfit with pumps	10.00
	Derricks, 60 feet to 85 feet	2.00
	Derricks, 30 feet to 59 feet	1.50
	Derricks, less than 30 feet	1.00
	Derricks, breast	.25
24	Derricks, circular swing	.25
	Elevators, platform or bucket	.25
	Elevators with bins for concrete	.50
	Engines, skeleton, 3-drum	2.00
	Engines, skeleton, 2-drum	1.50
	Engines, skeleton, 1-drum	1.00
	Engines, steam, horizontal, 11 to 40 h. p	1.50
	Engines, steam, upright, to 10 h. p	.50
	Engines, gasoline, to 8 h. p	.50
	Engines, 2-drum, with electric motor	4.00
	Engines, gasoline, 10 h. p	1.00
	Engines, derricks, swinging	.50
	Hammers, riveting	.25
	Hod elevating machine	1.00
	Levelling instruments, engineers'	.25
	Locomotive, 36-inch gauge	5.00
	Locomotive, standard gauge	10.00
	Mixers with boiler sideloader	4.00
	Mixers with electric motors, 1 yard	4.00
	Mixers without boiler, less than 1 yard	2.00
	Mixers without boiler, 1 yd. and larger	3.50
	Mixers with gasoline engine	3.00
	Motorcycles	1.00
	Motors, 2 h. p	.15
	Motors, 5 h. p	.25
	Motors, 10 h. p	.50
	Motors, 25 h. p	1.00
	Motors, 50 h. p	2.00
	Pumps, centrifugal, 10-inch, belt driven	3.00
	Pumps, centrifugal, 10-inch, with motor attached	4.00
	Pumps, centrifugal, 8-inch, steam connected	2.00
	Pumps, centrifugal, 6-inch, steam connected	1.50

Pumps, centrifugal, 4-inch, steam connected	$1.00
Pumps, duplex and triplex, to 3-inch	.50
Pumps, pulsometer, to 4-inch	1.55
Pumps, diaphragm	.20
Pumps, diaphragm, with gas engine	1.05
Pumps, triplex, with belt drive	.20
Pile drivers, drop	1.50
Pile drivers, drop, with single drum engine and boiler	3.50
Pile hammers, steam, up to 2,500 lbs	3.00
Pile hammers, steam, larger than 2,500 lbs	5.00
Rail, per ton	.06
Roller, horse	1.00
Steam drills	1.00
Small air drills	.50
Steam roller	8.00
Steam shovel	30.00
Sprinkling cart	1.00
Saw benches	.25
Saw benches with motor or gasoline engine	.50
Scale boxes	.25
Scraper, wheel	.50
Transits	.50
Typewriter	.10

Fuel and lubricants not included in these prices.

III. *General traverse.*

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by rule 34.

IV. *Argument and submission of case.*

On April 4, 1921, this case was argued and submitted by Mr. George A. King, for the plaintiff, and by Mr. John E. Hoover, for the defendant.

V. *Findings of fact, conclusion of law, and opinion of the court by Hay, J., and dissent by Campbell, Ch. J. Entered April 18, 1921.*

This case having been heard by the Court of Claims the court, upon the evidence, makes the following

FINDINGS OF FACT.

I.

The plaintiff, a corporation organized under the laws of the State of West Virginia, entered into a contract in writing with the United States on June 20, 1917, for the construction of buildings and other

utilities at Camp Zachary Taylor near Louisville, Ky. A copy of said contract is attached to the petition as Exhibit A, and is made a part hereof by reference.

II.

Maj. William A. Dempsey was the contracting officer named in the contract at the time of its execution. On July 16, 1917, Col. I. W. Littell, Q. M. C., was, by order of the Secretary of War, substituted for said Maj. Dempsey as contracting officer in this contract, as provided for in Article XV of the contract.

III.

Before this contract, or any other contract for cantonments or other construction for war purposes, was signed, negotiations were entered into between the War Department and the various surety companies as to the premium to be charged on bonds, the Secretary of War having directed that such premiums should be treated as part of the cost of the work. As the result of these negotiations the surety companies agreed to charge a premium of 1 per cent upon the penalty of the bond, their premium theretofore having been 2 per cent on the amount of work involved.

The War Department decided to fix the bond for the construction of each of the 16 cantonments for the National Army under the cost-plus system at $250,000. The contract of the plaintiff was to construct one of these cantonments, and its bond was fixed at $250,000.

28 Col. Littell, in charge of cantonment construction, notified both the plaintiff and the contracting officer that the rate had been fixed at 1 per cent, and directed the constructing quartermaster to refuse to transmit any bond not conforming to the requirement of the War Department as to premium. The contractor furnished a bond with the Fidelity & Deposit Co. of Maryland as surety in the sum of $250,000, which bond was required and approved by the contracting officer; and in accordance with the arrangement which had been made by the surety company with the War Department the Fidelity & Deposit Co. of Maryland fixed the premium at 1 per cent, or $2,500, and the plaintiff paid the said sum to said surety company, and subsequently the said sum of $2,500 was paid to the plaintiff by the United States in August, 1917, as a part of the costs of the work. Five hundred or more of such payments were made by the United States to contractors who had cost-plus contracts with the United States.

In January, 1920, in pursuance of a decision of the Comptroller of the Treasury that such premiums on surety bonds were not allowable under cost-plus contracts, said sum of $2,500 was deducted from a sum of money otherwise due the plaintiff, and it has not since been restored or paid to it.

IV.

The plaintiff, during the progress of the work, also paid a premium on the bond required to be given and which was given by Scherich & Mayer, subcontractors. The premium on said bond was $450 or 1 per cent on the amount of the bond. This sum was paid by the United States in August, 1917. It was deducted from a sum of money otherwise due the plaintiff, and it has not since been restored or paid to it. The voucher covering both of these deductions the plaintiff receipted under protest.

V.

Acting under instructions of the constructing quartermaster, who was the representative on the work of the contracting officer, the plaintiff took out policies of insurance of the following character: Public liability insurance, automobile liability insurance, and burglary and holdup insurance, and paid premiums to the insurance company amounting to the sum of $9,114.52. Maj. Dempsey, who on July 16, 1917, had ceased to be the contracting officer, on July 17, 1917, refused to approve the payment of premiums on these policies; but upon full payment of these premiums a voucher for the same was submitted by the plaintiff to the constructing quartermaster at the place of construction and by him transmitted to the War Department. On December 22, 1917, Col. I. W. Littell, the contracting officer, approved the action of the plaintiff in taking out the policies of insurance above referred to and authorized and directed the constructing quartermaster to pay to the plaintiff the sum of $9,114.52, the amount of the premiums paid by it on said policies. The said quartermaster submitted the question of payment of the aforesaid amount to the Comptroller of the Treasury, who decided that the said amount should not be paid to the plaintiff, and said amount has not been paid by the United States to the plaintiff.

29 CONCLUSION OF LAW.

The court, upon the foregoing findings of fact, decides as a conclusion of law that the plaintiff is entitled to recover the sum of $2,500 as found in Finding III; the sum of $450 as found in Finding IV; and the sum of $9,114.52 as found in Finding V. It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of twelve thousand and sixty-four dollars and fifty-two cents ($12,064.52).

OPINION.

HAY, *Judge*, delivered the opinion of the court:

This is a suit brought by the plaintiff to recover the sum of $12,064.52. This sum is made up of items which the plaintiff claims it

is entitled to by reason of the fact that the items so claimed shoul have been paid by the defendants under the contract which is base upon the system of cost of construction plus a fee. The contra provides that the plaintiff shall be reimbursed for such of its actu net expenditures in the performance of the work as may be approve or ratified by the contracting officer. For its own services the plai tiff was to receive a fee based upon a sliding scale with a maximu limit.

There is no dispute as to the facts. The plaintiff made the e penditures, but the defendants contend that the bond for pe formance required by Article IX of the contract is not a bond with the discretion of the contracting officer to approve or require, a that the expenditure of $2,500, the premium on the bond, did n fall within the expenditures provided for in Article II of the co tract. It is difficult to understand why the premium on such bo is not a part of the cost of the contract. It had to be given a approved before the contract could take effect; it was a cost whi the contractor was called upon to incur; it was a cost moreover whi the contract itself provided for; it can not be said that it is separa and distinct from the contract, and not a part of it. It was a bo which was required by statute, and before being accepted had to approved by the contracting officer. 33 Stat. 811; 28 Stat. 2 Army Regulations Per. 569.

The bond in this case was required and approved by the contra ing officer; the premium on the bond was paid by the United Stat to the plaintiff in accordance with paragraph h, Article II, of t contract. More than two years after this payment was made the plaintiff it was deducted from money otherwise due the plainti In view of what has been said, and in view of the fact that t United States entered into negotiations with the various surety co panies for the purpose of having them reduce their premiums such bonds before this or any similar contracts were executed, th showing their purpose and intention to pay the cost of such bon the court is of opinion that the premium on this bond is proper payable by the United States under the terms of the contract.

The next item of the claim is the amount of premiums of insura paid by the plaintiff. These premiums were paid by the plaint and such payment was approved by the contracting officer, a
30 having been so approved under Article II of the contract t payment must be allowed.

A judgment in the sum of $12,064.52 will be entered for the pla tiff. It is so ordered.

GRAHAM, *Judge;* DOWNEY, *Judge*, and BOOTH, *Judge*, concur.

CAMPBELL, *Chief Justice*, dissents:

I dissent from the judgment as to the two items involving cost contractor's and subcontractor's bonds.

31 VI. *Judgment of the court.*

At a Court of Claims held in the City of Washington on the eighteenth day of April, A. D. 1921, judgment was ordered to be entered as follows:

The court, upon due consideration of the premises, find in favor of the plaintiff, and do order, adjudge, and decree that the Mason and Hanger Company as aforesaid is entitled to recover and shall have and recover of and from the United States the sum of twelve thousand and sixty-four dollars and fifty-two cents ($12,064.52).

BY THE COURT.

VII. *Proceedings after entry of judgment.*

On June 11, 1921, the defendant filed a motion to amend the court's findings of fact.

On June 13, 1921, the defendant's motion to amend findings of fact was overruled in open court after argument.

VIII. *Defendant's application for and allowance of an appeal.*

From the judgment rendered in the above-entitled cause on the 13th day of June, 1921, in favor of claimant, the defendants, by their Attorney General, on the 28th day of June, 1921, make application for, and give notice of, an appeal to the Supreme Court of the United States.

ROBERT H. LOVETT,
Assistant Attorney General.

Filed June 28, 1921.

Ordered:

That the above appeal be allowed as prayed for.

June 30, 1921.

EDWARD K. CAMPBELL,
Chief Justice.

32 Court of Claims.

MASON & HANGER COMPANY
vs.
UNITED STATES. } No. 34208.

I, F. C. Kleinschmidt, assistant clerk, Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law, and opinion of the court by Hay, J., and dissent by Campbell, Ch. J.; of the judgment of the court; of the defendant's application for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City this 1st day of July, A. D. 1921.

[SEAL.]

F. C. KLEINSCHMIDT,
Assistant Clerk, Court of Claims.

(Indorsement on cover:) File No. 28,365, Court of Claims. Term No. 410. The United States, appellant, *vs.* Mason & Hanger Company. Filed July 13th, 1921. File No. 28,365.

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